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WHO'S YOUR SOVEREIGN?: THE STANDING DOCTRINE OF *PARENS PATRIAE* & STATE LAWSUITS DEFENDING SANCTUARY POLICIES

Lexi Zerrillo*

Give me your tired, your poor, your huddled masses yearning to
breathe free, the wretched refuse of your teeming shore. Send these,
the homeless, tempest-tost to me, I lift my lamp beside the golden
door!

—Emma Lazarus, *The New Colossus* (Nov. 2, 1883)¹

INTRODUCTION

America has a long and complex history with immigration. In recent years, immigration policy has been at the forefront of the most contentious issues that remain salient and seemingly unsolvable.² But imagine being too afraid to drive your children to and from school, because you may be pulled over at an immigration-check roadblock. Or imagine feeling compelled to only take back-road, circuitous routes to work which add minutes or hours to your commute because you must avoid being pulled over for any reason. For many documented and undocumented immigrants in the United States these are not mere imaginings; they have manifested into a terrible reality of everyday life.³ In February of 2017, the residents of Las Cruces, New Mexico, experienced this terror.⁴ Immigrations and Customs Enforcement (ICE) conducted

* JD Candidate, William & Mary Law School, 2019. BA, Stonehill College, 2016. It would be justifiably vexing for my parents if I did not sincerely thank them for supporting me throughout the process of putting this Note together. I would be nowhere without their support. I also want to thank Professor Tara Leigh Grove for her endless enthusiasm for the world of Federal Courts, which led me to take on this topic.

¹ National Park Service, *The New Colossus*, <https://www.nps.gov/stli/learn/historyculture/colossus.htm> [<https://perma.cc/P3P9-92K2>] (last visited Nov. 29, 2018).

² See generally Kate M. Manuel, *State Challenges to Federal Enforcement of Immigration Law: From the Mid-1990s to the Present*, CONGRESSIONAL RESEARCH SERVICE (Aug. 1, 2016), <https://fas.org/sgp/crs/homesec/R43839.pdf> [<https://perma.cc/HC8W-G2UN>] (highlighting many of the cases states have brought challenging immigration policies since the 1990s).

³ See, e.g., Ray Sanchez, *After ICE Arrests, Fear Spreads Among Undocumented Immigrants*, CNN (Feb. 12, 2017, 7:10 AM), <https://www.cnn.com/2017/02/11/politics/immigration-roundups-community-fear/index.html> [<https://perma.cc/QT68-NDS9>] (noting this fear leads families to keep their children home from school, avoid going out to restaurants, or even answering knocks on their doors).

⁴ Jonathan Blitzer, *After an Immigration Raid, a City's Students Vanish*, NEW YORKER (Mar. 23, 2017), <https://www.newyorker.com/news/news-desk/after-an-immigration-raid-a-citys-students-vanish> [<https://perma.cc/MLH7-FY3R>].

a raid on the outskirts of their town after President Trump signed executive orders initiating a crackdown on undocumented immigrants.⁵ Rumors immediately spread throughout the town that this was only the first of many raids to come, and as a result “*twenty-one-hundred* of the district’s twenty-five thousand students missed school” the next day, and two thousand were absent on the following day.⁶ The superintendent wrote a letter to parents, assuring them that the school “[did] ‘not anticipate any ICE activity occurring on school campuses’” but teachers and staff were astounded by the two-day drop in attendance immediately after this initial raid.⁷

This impact is not limited to borderland communities like those in New Mexico.⁸ In 2016, educators in Prince George’s County, Maryland, wrote to the Department of Homeland Security citing emotional and social impacts of raids on their student communities.⁹ Durham, North Carolina, also faced large drops in attendance “after a student was taken into custody by immigration agents while walking to school.”¹⁰ These types of stories are only becoming more common, with one hundred people detained in Los Angeles in one week during the month of February 2018.¹¹ Some states and cities have responded by actively advising their law enforcement agents not to target sensitive locations, like schools, hospitals, or churches.¹² But these types of “sanctuary policies” have been targeted and adamantly threatened by the Trump Administration.¹³

Questions linger about who, if anyone, can sue to stop the Executive Branch from forcing states and municipalities to end these sanctuary policies. In recent Supreme Court history, Texas tried to sue to compel the Federal Government to enforce federal immigration laws.¹⁴ But presented here is the inverse of what was at stake in *United States v. Texas*; the issue is whether the executive can force states to comply with the federal immigration enforcement scheme, especially when that scheme commandeers local and state police and commands them to apply certain tactics.¹⁵

⁵ *Id.*

⁶ *Id.* (emphasis added).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ James Doubek, *ICE Detains More Than 100 in Los Angeles—Area Immigration Raids*, NPR (Feb. 15, 2018, 8:26 AM), <https://www.npr.org/sections/thetwo-way/2018/02/15/585973495/ice-detains-more-than-100-in-los-angeles-area-immigration-raids> [<https://perma.cc/C5TY-RGRQ>].

¹² See *infra* note 92 and accompanying text.

¹³ See *infra* Section I.C.

¹⁴ *United States v. Texas*, 136 S. Ct. 2271 (2016). See also Jonathan Remy Nash, *Sovereign Preemption State Standing*, 112 NW. L. REV. 201, 247–48 (2017) (discussing this lawsuit as an example of states suing because of “underenforcement” of federal immigration law).

¹⁵ See, e.g., NAT’L CONFERENCE OF STATE LEGISLATURES, *Summary of Executive Orders on Immigration* (Jan. 26, 2017), <http://www.ncsl.org/research/immigration/summary-of-executive-orders-on-immigration.aspx> [<https://perma.cc/H88B-AL3T>] (discussing one of the Executive Orders directed at sanctuary policies).

This Note will argue that states, as the proper parent for their citizenry in this specific instance, should be allowed to sue on behalf of their residents to defend sanctuary policies. *Parens patriae*, or quasi-sovereign standing, would allow states to get past the Article III hurdle of standing—which is an initial requirement to bring a case or controversy before federal courts.¹⁶ At issue here is a state's ability to choose how to implement police power within its borders. Neither the federal government, nor individual plaintiffs, are best suited to bring a lawsuit over such policies.¹⁷ This is a sensitive topic: Immigration Law enmeshes every level of government and involves both citizens and undocumented immigrants residing in communities across the country.¹⁸ *Parens patriae*, or the doctrine of a state bringing a lawsuit on behalf of its citizens, is the proper vehicle to justify states suing the federal government to defend sanctuary immigration policies.

This Note is broken down into two primary sections. The first section will introduce a variety of background material, with Part A addressing important points in the history and development of *parens patriae*. Within Part A, subpart 1 will discuss standing as a general Article III requirement, then subpart 2 will identify state standing more specifically, and lastly subpart 3 will discuss *parens patriae* as a subset of state standing doctrine. Then Part B will introduce the highlights in the controversy surrounding *parens patriae* as a doctrine of standing by addressing three specific cases, and how the doctrine has changed in the eyes of the Court over time.

The next section will involve a two-part analysis. First, in Part A of this section, this Note will argue that *parens patriae* is the best vehicle for justifying state-based lawsuits to defend sanctuary cities. Subpart 1 will involve a discussion of the constitutional role that states play in our overall structure of federalism. Subpart 2 will address concerns about federal Immigration Law preempting state law. Then Part B of this section will address why *parens patriae* is an important basis for the particular issue of sanctuary cities. Subpart 1 of this final section will address the benefits of allowing state attorneys general to sue on behalf of their citizens. Subpart 2 will address other safeguards that provide prudential limits to ensure *parens patriae* would not be an abused doctrine, flooding courts in the future.

I. BACKGROUND

A. History and Development of *Parens Patriae* as a Basis for State Standing

Parens patriae translates from Latin to mean “parent of the country”¹⁹ and it is a common law concept recognized by American courts.²⁰ *Parens patriae* originated

¹⁶ See *infra* Section I.A.1.

¹⁷ See *infra* Section II.A.1.

¹⁸ See *infra* Section II.A.1.

¹⁹ *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 600 n.8 (1982) (citing BLACK'S LAW DICTIONARY which defines *parens patriae* as traditionally referring to the “role of [the] state as sovereign and guardian of persons under legal disability”).

²⁰ See *id.* at 600 (explaining that American courts now recognize the *parens patriae* doctrine as a legislative prerogative).

as the justification for a royal prerogative.²¹ This prerogative allowed the King of England to personally sue as the sovereign on behalf of individuals, like minors, who could not bring lawsuits themselves.²² Today, *parens patriae* is one type of standing that states utilize to meet the standing prerequisite of the Article III case or controversy requirement of the Constitution.²³ Before delving too far into the nuances of *parens patriae* standing, general standing requirements will be introduced as well as state standing in order to place *parens patriae* into context.

1. General Standing

The “standing” requirement is enshrined in the “case or controversy” language of Article III of the U.S. Constitution.²⁴ A litigant must have standing in order to bring a case before the Supreme Court.²⁵ Standing doctrine is “‘built on a single basic idea—the idea of separation of powers.’ In theory, standing limits Article III courts to judicial business by requiring private litigants to show a concrete, imminent, and personal injury-in-fact traceable to the defendant and redressable by a judicial remedy.”²⁶ Unlike private litigants, “[a] state has standing to vindicate its ‘sovereign power . . . to create and enforce a legal code’ and to protect public health and welfare.”²⁷

After the Supreme Court’s ruling in *Massachusetts v. EPA*,²⁸ states are often said to have a more relaxed or easier standard for standing than private litigants.²⁹ This is a result of the “special solicitude” given to states in that case, which is explicitly denied to individual litigants, and allows states to show a less direct injury than

²¹ See Shannon M. Roesler, *State Standing to Challenge Federal Authority in the Modern Administrative State*, 91 WASH. L. REV. 637, 662 (2016).

²² See Kenneth Juan Figueroa, *Immigrants and the Civil Rights Regime: Parens Patriae Standing, Foreign Governments and Protection from Private Discrimination*, 102 COLUM. L. REV. 408, 431 n.119 (2002) (explaining the roots of *parens patriae* in English common law which allowed the sovereign to use *parens patriae* status on behalf of children and people with mental disabilities).

²³ See Roesler, *supra* note 21, at 662 (“When this country achieved its independence, the prerogatives of the crown devolved upon the people of the states. And this power still remains with them, except so far as they have delegated a portion of it to the Federal government The state, as a sovereign, is the *parens patriae*.”).

²⁴ See U.S. CONST. art. III, § 2, cl. 1–2.

²⁵ See Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2239 (1999) (introducing the insistence of the Supreme Court that litigants show standing as well as injury, causation, and redressability).

²⁶ Seth Davis, *Standing Doctrine’s State Action Problem*, 91 NOTRE DAME L. REV. 585, 595 (2015) (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)).

²⁷ *Id.* (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601, 607 (1982)).

²⁸ 549 U.S. 497 (2007); see *infra* Section I.B.3.

²⁹ See Davis, *supra* note 26, at 595.

individuals bringing a lawsuit.³⁰ Essentially, the “generalized grievance” standard which the Court had previously rejected rather stringently may no longer be a prudential limitation on standing for states going forward.³¹ A comparison of the injury, causation, and redressability requirements required in *Allen v. Wright*,³² where the Court held the parents of black public school children to a stringent level of analysis, compared with the same elements as required by the Court in *Massachusetts v. EPA*,³³ where Massachusetts was able to submit a generalized grievance with attenuated causation and redressability elements, demonstrates this differential treatment.³⁴

2. State Standing

The case or controversy requirement of Article III is vague for many reasons,³⁵ but in this context Article III’s vagueness about what cases state governments can bring before the Supreme Court presents problems.³⁶ State standing has changed significantly throughout the Court’s history.³⁷ Three particular sub-areas of precedent that meet Article III muster are proprietary, sovereign, and quasi-sovereign interests.³⁸ Woolhandler and Collins explained that in the history of state standing:

[S]tates generally could pursue only their common-law interests. These interests included those that individuals could pursue, such as property or contract claims. By contrast, with the exception of boundary disputes, states could not pursue their interests in “sovereignty.” Thus, states could not (in federal court) ordinarily litigate against the federal government or other states[?] conflicting

³⁰ *Id.*

³¹ Jonathan Remy Nash, *Sovereign Preemption State Standing*, 112 NW. L. REV. 201, 245 (2017).

³² 468 U.S. 737 (1984).

³³ 549 U.S. 497 (2007).

³⁴ *Id.*

³⁵ Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine?: An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591, 594 (2010) (“Indeed, even the most basic question of the origins of the standing doctrine eludes scholars. Conventional accounts focus on the nature of the case or controversy requirement, the collision between the administrative state and private rights-based models of judicial resolution, and caseload management.”).

³⁶ Tara Leigh Grove, *When Can A State Sue The United States?*, 101 CORNELL L. REV. 851, 858 (2016) (“Article III provides that the federal ‘judicial Power shall extend to [certain] Cases . . . [and] Controversies’ involving both the United States and the States. But the constitutional text is noticeably silent about what types of ‘cases’ and ‘controversies’ governments may bring—that is, about the scope of governmental standing.”).

³⁷ See Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 392 (1995) (“Part I of this Article provides a revisionist history of state standing in the federal courts.”).

³⁸ Roesler, *supra* note 21, at 640.

claims to regulate, nor could they seek to enforce their own legislation or to vindicate their extrastatutory interests in protecting their citizenry. Such sovereignty interests could be pursued only through state legislation and its enforcement in the courts of the legislating state. Such interests might also be indirectly considered, incident to judicial resolution of familiar common-law disputes, typically in cases not involving the state as a formal litigant.³⁹

Proprietary interests are thus “analogous to private common law interests (state property and contracts, for example),” and they “resemble injuries in suits between private parties.”⁴⁰ Sovereign interests can be best “understood as a state’s interests in its jurisdiction—in terms of both (1) the geographic scope over which a government exercises power and (2) whether it has authority to do so.”⁴¹ Quasi-sovereign interests have been narrowed down to include two prongs.⁴² These are, “‘the health and well-being—both physical and economic—of [a State’s] residents in general’ and its ‘interest in not being discriminatorily denied its rightful status within the federal system’ by being excluded from benefits flowing from [the federal system].”⁴³ Quasi-sovereign suits have also been linked directly with *parens patriae* suits and both can be traced back to public nuisance cases.⁴⁴ These interstate nuisance cases overlapped with state police power interests and were suits in equity that fell under the original jurisdiction of the Supreme Court.⁴⁵ Notably, “[a] state’s sovereign integrity and autonomy are most often related to the state’s police powers.”⁴⁶

3. *Parens Patriae* Standing

Parens patriae standing and quasi-sovereign standing, as closely linked doctrines, can be collapsed into one category.⁴⁷ Again, quasi-sovereign standing encompasses two common state interests: one is the health and well-being interest a state has for its residents; and the other is the state’s interest in “not being discriminatorily denied its rightful status within the federal system.”⁴⁸ Many scholars assert that

³⁹ Woolhandler & Collins, *supra* note 37, at 392–93.

⁴⁰ Roesler, *supra* note 21, at 640.

⁴¹ Katherine Mims Crocker, Note, *Securing Sovereign State Standing*, 97 VA. L. REV. 2051, 2057 (2011).

⁴² *See id.* at 2064–67.

⁴³ *Id.* at 2067.

⁴⁴ Roesler, *supra* note 21, at 660.

⁴⁵ *Id.* at 663.

⁴⁶ David A. Nagdeman, Comment, *Sovereign Ephemera: State Standing Against the Federal Government for Injuries to Quasi-Sovereign Interests*, 90 TEMP. L. REV. 53, 61 (2017).

⁴⁷ *See* Crocker, *supra* note 41, at 2071–72. *Contra id.* at 2062–63 (asserting that quasi-sovereign interests should be separated out into a category independent of *parens patriae* standing).

⁴⁸ Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?*:

when a state brings a lawsuit under the pretense of *parens patriae*, they are really bringing a suit under the concept of quasi-sovereign standing because the two are inextricably linked.⁴⁹ The police power and health and well-being prongs are what bind these two theories together.⁵⁰ States have the police power to protect the health, safety, and well-being of their citizens.⁵¹ Because the textual overlap immediately anticipates the crossover between these two doctrines, going forward, when this Note uses the term *parens patriae*, it will encompass quasi-sovereign standing as well, so the two will be combined.

B. Controversy Surrounding *Parens Patriae* Standing

Throughout the Court's history, *parens patriae* standing has undergone numerous changes.⁵² This section will highlight three of the most important cases that led to changes in the doctrinal development of *parens patriae* standing.

1. *Massachusetts v. Mellon*

There is plenty of controversy surrounding the Supreme Court's treatment of the concept of *parens patriae* standing. In particular, the 1923 case *Massachusetts v. Mellon*⁵³ led scholars to grapple with the validity of *parens patriae* as a basis for state standing.⁵⁴ In *Mellon*, Massachusetts sued on behalf of its resident taxpayers.⁵⁵ Massachusetts alleged that the federal Maternity Act infringed on local concerns within the state.⁵⁶ Specifically, Massachusetts asserted that the Maternity Act

Massachusetts v. EPA's New Standing Test for States, 49 WM & MARY L. REV. 1701, 1758–59 (2008) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982)).

⁴⁹ See Crocker, *supra* note 41, at 2071–72 (noting there is agreement that when states bring quasi-sovereign suits they are also *parens patriae* suits). See also *Snapp*, 458 U.S. at 602–03 (“That a *parens patriae* action could rest upon the articulation of a ‘quasi-sovereign’ interest was first recognized by this Court in *Louisiana v. Texas*, 176 U.S. 1 (1900). In that case, Louisiana unsuccessfully sought to enjoin a quarantine maintained by Texas officials, which had the effect of limiting trade between Texas and the port of New Orleans. The Court labeled Louisiana’s interest in the litigation as that of *parens patriae*. . . . Although Louisiana was unsuccessful in that case in pursuing the commercial interests of its residents, a line of cases followed in which States successfully sought to represent the interests of their citizens in enjoining public nuisances.”).

⁵⁰ Roesler, *supra* note 21, at 663 (explaining that there is an overlap between *parens patriae* and state police powers, specifically because the first lawsuits that states utilized *parens patriae* for involved public nuisance issues).

⁵¹ *Id.*

⁵² See Roesler, *supra* note 21, at 662–77 (tracing the development of this doctrine through many major cases beyond the three highlighted here).

⁵³ 262 U.S. 447 (1923).

⁵⁴ See, e.g., Mank, *supra* note 48, at 1769–74 (discussing how the *Mellon* case seemed to be a bar to states using *parens patriae* as a justifiable standing argument).

⁵⁵ *Mellon*, 262 U.S. at 479.

⁵⁶ *Id.*

violated the Tenth Amendment by taking Massachusetts's property, namely some of the state's future tax earnings, without due process.⁵⁷ The Supreme Court held that Massachusetts lacked proper jurisdiction to bring the case.⁵⁸ In particular the Court noted that:

Ordinarily, at least, the only way in which a State may afford protection to its citizens in such cases is through the enforcement of its own criminal statutes, where that is appropriate, or by opening its courts to the injured persons for the maintenance of civil suits or actions. But *the citizens of Massachusetts are also citizens of the United States*. It cannot be conceded that a State, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the State, under some circumstances, may sue in that capacity for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field *it is the United States, and not the State, which represents them as parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.⁵⁹

After this case, states had to pass the “Mellon bar” and justify to the Court why they were the proper *parens patriae* rather than the federal government in a particular case.⁶⁰ However, *Mellon* did not stop states from bringing *parens patriae* lawsuits.⁶¹ Notably, lower courts have concluded *Mellon* “was only a prudential limitation on standing subject to congressional override rather than a constitutional prohibition against standing.”⁶²

2. *Alfred L. Snapp & Son v. Puerto Rico*

After the addition of the “Mellon bar” to *parens patriae* standing analysis, the next major case leading to a shift in the doctrine of *parens patriae* was *Alfred L. Snapp*

⁵⁷ *Id.* at 479–80.

⁵⁸ *Id.* at 480.

⁵⁹ *Id.* at 485–86 (emphasis added).

⁶⁰ Matthew R. Cody, Comment, *Special Solicitude for States in the Standing Analysis: A New Type of Federalism*, 40 MCGEORGE L. REV. 149, 157 (2009).

⁶¹ *See, e.g., Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982).

⁶² Mank, *supra* note 48, at 1769–71. *See* David M. Howard, *State Parens Patriae Standing to Challenge the Federal Government: Overruling the Mellon Bar*, 11 N.Y.U. J. L. & LIBERTY 1089, 1108–1111 (2018) (arguing that the *Mellon* bar has been completely overruled by history and precedent because it has been consistently disregarded in the courts, particularly since *Massachusetts v. EPA*).

& *Son v. Puerto Rico (Snapp)*.⁶³ In *Snapp*, Puerto Rico sued Virginian apple-growers.⁶⁴ The growers were allegedly firing, refusing to hire, or were subjecting many qualified Puerto Rican migrant growers to different conditions than other workers.⁶⁵ The Supreme Court held that Puerto Rico had a valid quasi-sovereign interest to bring the suit.⁶⁶ The Court noted that, “[i]n order to maintain [a *parens patriae*] action, the State must articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party. The State must express a quasi-sovereign interest.”⁶⁷ Many scholars view *Snapp* as a turning point where the Supreme Court established two important distinctions.⁶⁸ First, the Court solidified the link between *parens patriae* and quasi-sovereign standing.⁶⁹ Second, the Court separated quasi-sovereign/*parens patriae* suits into their own definitively unique category of lawsuits⁷⁰—separate and apart from proprietary or sovereignty based lawsuits, which were the other two subcategories discussed above in Section I.A.2.⁷¹

3. *Massachusetts v. EPA* and the Modern Use of *Parens Patriae*

Since *Snapp* there has been some notable expansion of the *parens patriae* doctrine as a justification for state standing. In *Massachusetts v. EPA*, the Supreme Court explicitly granted Massachusetts special solicitude regarding the three traditional threshold requirements for standing (injury, causation, and redressability).⁷² The Court granted this special solicitude because of the quasi-sovereign interest Massachusetts asserted.⁷³ The Court characterized the quasi-sovereign interest as Massachusetts’s interest in protecting its territory from environmental destruction.⁷⁴ Massachusetts sued the EPA for failing to comply with greenhouse gas emissions regulations.⁷⁵ The

⁶³ See 458 U.S. 592.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 607.

⁶⁷ *Id.*

⁶⁸ See Crocker, *supra* note 41, at 2093–94 (“Judge Hudson agreed with Virginia. Relying on *Alfred L. Snapp*, he separated sovereign from quasi-sovereign interests, indicated that *parens patriae* standing applies solely to the latter, and found that Virginia’s suit implicates sovereign interests only.”).

⁶⁹ Roesler, *supra* note 21, at 670–71.

⁷⁰ See, e.g., Crocker, *supra* note 41, at 2066–67 (noting quasi-sovereign interests are neither sovereign nor proprietary interests but its own category now that can serve as the basis for a lawsuit when the well-being of a state’s populace is at stake).

⁷¹ See *supra* Section I.A.2 for an explanation of proprietary and sovereignty-based lawsuits.

⁷² *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (“Well before the creation of the modern administrative state, we recognized that States are not normal litigants for the purposes of invoking federal jurisdiction.”).

⁷³ *Id.* at 520.

⁷⁴ *Id.* at 519–21.

⁷⁵ *Id.* at 505.

EPA was supposed to enforce a limit on emissions from cars, but had failed to regulate them.⁷⁶ The Court declared that Massachusetts had successfully met all of the standing requirements to bring the case.⁷⁷ The majority specifically held that, “[g]iven . . . Massachusetts’s stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.”⁷⁸ In his dissent, Chief Justice Roberts specifically addressed *parens patriae*, stating that, “[f]ar from being a substitute for Article III injury, *parens patriae* actions raise an additional hurdle for a state litigant.”⁷⁹ Chief Justice Roberts did not stop there. He also noted, “[j]ust as an association suing on behalf of its members must show not only that it represents the members but that at least one satisfies Article III requirements, so too a State asserting quasi-sovereign interests as *parens patriae* must still show that its citizens satisfy Article III.”⁸⁰ Whether or not it merely creates an additional hurdle for states to pass standing requirements or not, *Massachusetts v. EPA* clearly shows that *parens patriae* standing is still a viable option for states to bring lawsuits on behalf of their citizens.

Most recently, there was some use of *parens patriae* as a basis for state standing in the “travel ban” cases.⁸¹ These cases challenge the Executive Orders of the Trump Administration which restrict immigration from certain countries.⁸² In *Aziz v. Trump*, the Eastern District of Virginia held that the Commonwealth had standing to bring a case challenging the President’s Executive Order.⁸³ Virginia was granted standing because “to the extent that a state argues that executive action is inconsistent with a federal statute, the state . . . is not [sic] be barred by the *Mellon* doctrine . . . when the state has grounds to argue that the executive action is contrary to federal statutory or constitutional law.”⁸⁴

Additionally, in the D.C. Circuit, the Emoluments Clause litigation against President Trump has also involved *parens patriae* standing.⁸⁵ The court found D.C. and Maryland had sufficiently alleged *parens patriae* standing in protecting “their commercial residents and hospitality industry employees from economic harm.”⁸⁶ This recent use of *parens patriae* demonstrates the continued relevance of this doctrine today. In order to better understand the role that *parens patriae* standing

⁷⁶ *Id.* at 513.

⁷⁷ *Id.* at 526.

⁷⁸ *Id.* at 520.

⁷⁹ *Id.* at 538 (Roberts, C.J., dissenting).

⁸⁰ *Id.*

⁸¹ *See, e.g., Aziz v. Trump*, 231 F. Supp. 3d 23, 31–32 (E.D. Va. 2017).

⁸² *See, e.g., Exec. Order No. 13769*, 82 Fed. Reg. 8977, 8978–79 (Jan. 27, 2017).

⁸³ *Aziz*, 231 F. Supp. 3d at 32.

⁸⁴ *Id.* at 31–32 (citing *Wash. Utils. & Transp. Comm’n v. Fed. Comm’n Comm’n*, 513 F.2d 1142, 1153 (9th Cir. 1975)).

⁸⁵ *District of Columbia v. Trump*, No. 17-1596, 2018 U.S. Dist. LEXIS 51365, at **13 (D. Md. Mar. 28, 2018).

⁸⁶ *Id.* at **44–45.

may play in cases of sanctuary policies, another timely issue before courts today, a brief discussion of the development of those policies is necessary.

C. *The Development of Sanctuary Policies*

Immigration is one area where the role of state and local law enforcement has been increasing and intertwining in recent years.⁸⁷ States have had polarizing responses to this increased role: some states adopt “sanctuary” policies to limit “the jurisdiction’s cooperation in federal enforcement efforts.”⁸⁸ Other states have “sued to compel federal officials to enforce” restrictive provisions like the Immigration and Nationality Act (INA) to exclude and remove “unauthorized aliens.”⁸⁹

The first sanctuary policy created is associated with a 1989 ordinance passed in San Francisco.⁹⁰ The ordinance was passed to prohibit the city’s money or resources from being used to gather information on immigration status for the federal government.⁹¹ Sanctuary policies are usually a response by communities within some states to limit their level of cooperation with federal policies.⁹² Federal policies often call upon local and state law enforcement to question the immigration status of arrestees.⁹³ Federal policies may also deputize local law enforcement in an effort to get undocumented immigrants into the custody of federal authorities.⁹⁴ Some common forms of sanctuary policies adopted in states involve local or state police choosing not to enter into contracts with the federal government to hold detained immigrants in their jails, refusing to allow Immigration and Customs Enforcement (ICE) into jails without a warrant, or restricting ICE from emotionally charged environments like hospitals or schools.⁹⁵ These policies can be formally adopted or they may be manifested as

⁸⁷ See Monica Varsanyi, Paul Lewis, Doris Provine & Scott Decker, *Immigration Federalism: Which Policy Prevails?*, MIGRATION POL’Y INST. (Oct. 9, 2012), <http://www.migrationpolicy.org/article/immigration-federalism-which-policy-prevails/> [<https://perma.cc/C9YW-CBR4>] (discussing the transition away from strong federal control of immigration towards a more intertwined approach with state and local law enforcement).

⁸⁸ Manuel, *supra* note 2.

⁸⁹ *Id.*

⁹⁰ Ann Morse, Lydia Deatherage & Veronica Ibarra, *What’s a Sanctuary Policy? FAQ on Federal, State and Local Action on Immigration Enforcement*, NAT’L CONFERENCE OF STATE LEGISLATURES (July 28, 2017), <http://www.ncsl.org/research/immigration/sanctuary-policy-faq635991795.aspx> [<https://perma.cc/EK88-PLBL>].

⁹¹ *Id.*

⁹² See “Sanctuary” Policies: An Overview, AM. IMMIGR. COUNCIL 1 (Feb. 2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/sanctuary_policies_an_overview.pdf [<https://perma.cc/GKV8-BDMJ>].

⁹³ See *id.* at 2.

⁹⁴ See *id.* (noting that sanctuary policies have no set definition and often take different forms).

⁹⁵ See *id.*

informal tactics used by local or state police.⁹⁶ Regardless of the policy chosen, “[t]he goal of the constellation of informal and formal policies is generally to protect undocumented immigrants who are not otherwise engaged in criminal activity from being detained or deported.”⁹⁷

Notably, one of President Trump’s Executive Orders, on public safety within the United States, directly attacked cities with sanctuary policies.⁹⁸ The Executive Order claimed that these jurisdictions must be reprimanded via restrictions on the funding and grants they receive from the federal government.⁹⁹ California has remained at the forefront as a defender of its sanctuary policies.¹⁰⁰ California recently brought a lawsuit against the Department of Justice (DOJ) in response to “the administration’s plans to cut off millions of dollars in federal funding to so-called sanctuary cities unless they begin cooperating with federal immigration agents.”¹⁰¹ California is not alone in challenging the DOJ over funding cuts to sanctuary cities.¹⁰² Chicago also brought a lawsuit alleging that funding cuts “fly in the face of longstanding city policy that promotes cooperation between local law enforcement and immigrant communities.”¹⁰³ Most recently, Attorney General Jeff Sessions has announced that four cities must alter their practices on cooperating with federal immigration officials to deport detainees held in local jails.¹⁰⁴ Cities failing to comply will lose funding for federal public safety grants.¹⁰⁵ Thus, sanctuary policies, at the forefront of the

⁹⁶ Tal Kopan, *What Are Sanctuary Cities, And Can They Be Defunded?*, CNN (Mar. 26, 2018, 3:40 PM), <http://www.cnn.com/2017/01/25/politics/sanctuary-cities-explained/index.html> [<https://perma.cc/D2NA-AUVM>].

⁹⁷ *Id.*

⁹⁸ See NAT’L CONFERENCE OF STATE LEGISLATURES, *supra* note 15.

⁹⁹ *Id.*

¹⁰⁰ Vivian Yee, *California Sues Justice Dept. Over Funding for Sanctuary Cities*, N.Y. TIMES (Aug. 14, 2017), <https://www.nytimes.com/2017/08/14/us/california-sues-trump-administration-over-sanctuary-city-policy.html> [<https://perma.cc/VBM7-5XUN>].

¹⁰¹ *Id.*

¹⁰² See, e.g., Kopan, *supra* note 96 (discussing pushback despite threats of the loss of federal funding in Chicago and New York and noting “more than 200 state and local jurisdictions did not honor requests from Immigration and Customs Enforcement to detain individuals”).

¹⁰³ Ilya Somin, *Chicago Files Suit Against Justice Department Policy Targeting Sanctuary Cities*, WASH. POST: THE VOLOKH CONSPIRACY (Aug. 7, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/08/07/chicago-files-suit-against-justice-department-policy-targeting-sanctuary-cities/?utm_term=.2b3379deaeec [<https://perma.cc/W36S-6B7V>]. See also Franco Ordonez, *Mexico Jumps Into Battle Over Texas ‘Sanctuary City’ Law*, MIAMI HERALD (Oct. 20, 2017), <http://www.miamiherald.com/news/nation-world/article179944046.html> [<https://perma.cc/PAR5-GNEK>] (demonstrating how far-reaching the impact of sanctuary policies are since Mexico is challenging a new Texas law that “if implemented, would crack down on sanctuary cities”).

¹⁰⁴ Dartunorro Clark, *Sessions Targets Four ‘Sanctuary Cities’ for Punishment*, NBC NEWS (Oct. 12, 2017, 1:43 PM), <https://www.nbcnews.com/politics/white-house/sessions-targets-four-sanctuary-cities-punishment-n810131> [<https://perma.cc/3DC7-GLDB>].

¹⁰⁵ *Id.*

debate about the role of states in federal immigration enforcement,¹⁰⁶ provide an interesting and poignant case study for arguments about *parens patriae* standing because of the links to quasi-sovereign state interests and particularly the focus on the police powers of states.

II. ANALYSIS

A. *Parens Patriae as a Vehicle for States to Defend Sanctuary Policies*

Parens patriae standing, or the ability of a state to bring a lawsuit in order to protect its quasi-sovereign interests,¹⁰⁷ is the appropriate justification for standing in lawsuits defending sanctuary policies. Multiple scholars have argued that states should receive special standing when their enforcement or administrative role is at issue.¹⁰⁸ States, “[h]aving agreed to play an administrative role, . . . have a direct interest in shaping the policies and actions of the federal agencies charged with ultimate authority under an administrative scheme. Having surrendered lawmaking authority, states have a clear interest—as separately constituted governments—in the implementation of federal law.”¹⁰⁹

Other scholars have taken on even more radical arguments about the potential uses of *parens patriae*, including one assertion that foreign governments should be able to use this standing doctrine to bring lawsuits on behalf of immigrants in the United States.¹¹⁰ As state and local law enforcement are expected to continue to take on increasingly heightened roles in the enforcement of federal immigration policy,¹¹¹ it should be expected that more litigation will arise where states and cities will seek to challenge the demands placed on them. *Parens patriae* standing best justifies these suits.

¹⁰⁶ See Bryan Griffith & Jessica M. Vaughan, *Maps: Sanctuary Cities, Counties, and States*, CTR. FOR IMMIGR. STUD., <https://cis.org/Map-Sanctuary-Cities-Counties-and-States> [<https://perma.cc/K5GB-HE8Q?type=image>] (last updated May 30, 2018) (depicting maps of sanctuary cities, counties, and states and areas at risk of losing funding from the federal government because of such policies).

¹⁰⁷ Crocker, *supra* note 41, at 2067 (noting that quasi-sovereign interests involve two prongs: first the state interest in the health and well-being of their citizens and second an interest in preventing the state from being discriminatorily denied its rightful status in the federal system).

¹⁰⁸ See Grove, *supra* note 36, at 883 (arguing that states should only receive special standing in limited circumstances, namely when they are suing to protect the enforceability of their own regulatory laws); see also Roesler, *supra* note 21, at 678 (advocating for a “governance approach” to allow states to challenge federal authority when the states are given a role in the implementation of federal law).

¹⁰⁹ Roesler, *supra* note 21, at 677.

¹¹⁰ See Figueroa, *supra* note 22, at 410; see also Kaitlin Ainsworth Caruso, *Associational Standing for Cities*, 47 CONN. L. REV. 59, 65, 99 (2014) (arguing that cities should be given associational standing like that available to corporations as an alternative to the messy *parens patriae* doctrine which does not lend itself to an easy definition).

¹¹¹ See *supra* Section I.C.

1. Linking Sanctuary Policies and State Police Powers: The Role of the States in Our Constitutional Framework

Sanctuary policies are crafted to achieve many different goals including: “strengthening resident-police relations and ensuring that all people feel comfortable reporting crimes, regardless of immigration status; allowing the police to determine how they will prioritize and allocate their resources; and protecting police agencies from liabilities resulting from local enforcement of federal immigration laws.”¹¹² The wide variety of goals prompting sanctuary policies all tie directly to a state’s police powers and duty to protect the health and well-being of its citizens. Although federal immigration laws generally preempt state immigration laws,¹¹³ sanctuary policies raise a different issue that is not preempted. This is because sanctuary policies are a reaction to the role demanded by the federal government from state and local law enforcement in the administration of federal immigration law. States are not creating sanctuary policies in order to have conflicting state immigration laws, they are reacting to federal laws which commandeer state police as administrative arms for federal policy,¹¹⁴ and states should be able to challenge this overreach into their realm of authority.

Additionally, with the “lack of coordination between the various policymaking bodies, immigration enforcement has the potential for cross-jurisdictional conflict and overlap, resulting in uncertainty among immigrants about which policy prevails.”¹¹⁵ Beyond the confusion that this power-sharing creates among different levels of government, “[t]he devolution of immigration enforcement from federal to local authorities threatens to disrupt fragile trust, nurtured over the years, between local law enforcement and immigrant communities.”¹¹⁶ The intertwining of all levels of government here should leave critics less concerned about states seeking to challenge their role within this system,¹¹⁷ especially when states are trying to vindicate the interests of their citizens.

Arguably, states are also vindicating their constitutional role and satisfying a functional purpose by bringing *parens patriae* suits, because one “major role for the states under the constitutional design is to ensure the continued health and well-being of

¹¹² “Sanctuary” Policies: An Overview, *supra* note 92.

¹¹³ See Cody, *supra* note 60, at 168–69 (discussing the need for Congressional authorization for states to challenge federal immigration laws because state laws are necessarily preempted and cannot conflict with federal laws).

¹¹⁴ See Varsanyi et al., *supra* note 87 (“Many large cities, for example, oppose enforcement partnerships with the federal government, but they operate within a jurisdictional network that subordinates their policymaking powers to the state. Sheriffs, who exercise considerable power over their entire county, add additional complexity.”).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See Roesler, *supra* note 21, at 677.

their citizens. The surest route the Constitution uses to protect the state's ability to pursue this role is to preserve . . . [the] prerogative to exercise its police power."¹¹⁸ Recent cases challenging the President's travel ban orders have asserted the sovereign interests states have in "carrying out its refugee policies' . . . [but note] legislative acts regulating foreign persons, straddle both the state's governing interests and territorial concerns."¹¹⁹ Thus, states are vindicating their constitutional role in bringing these suits, not unduly expanding their power.¹²⁰

Scholar Jonathan Remy Nash uses this constitutional/functional role argument to support his claim that states should have "sovereign preemption state standing" to bring claims when the federal government preempts state law but then underenforces the federal law that Congress enacted in that area.¹²¹ Although Nash is trying to open a limited window of access to the federal courts, by limiting standing to situations of underenforcement that have a nexus between the preempted and the underenforced areas of the law,¹²² his argument that underenforcement alone is appropriate is unconvincing in the context of sanctuary cities. Nash asserts that police power is purely an affirmative power to regulate, "not the power to abstain from regulation."¹²³ But this ignores the realities of police as they interact with immigrant communities as discussed above.¹²⁴ One exception where the federal government should not be able to over-enforce, or to try and coerce local and state police, is this especially sensitive area of immigration enforcement activity by police. Perhaps this could open up a potential slippery slope: if the door is opened for states to sue over this sensitive area, where do we close that door? But it seems that the nature of this particular issue, where implications for legal versus undocumented immigrants, as well as the intertwined nature of local, state, and federal law enforcement in maintaining law and order, calls for an exception.

Nash's point that standing should be limited to under-enforcement because there is less of a concern about finding private plaintiffs to assert the same issue is also particularly untrue in the sanctuary city context.¹²⁵ The fear that immigrants face in this context, whether they hold valid legal status in the country or not, will silence

¹¹⁸ Nash, *supra* note 31, at 231.

¹¹⁹ Nagdeman, *supra* note 46, at 94 (citing *Hawaii v. Trump*, 859 F.3d 741, 765–66 (9th Cir. 2017)).

¹²⁰ See Jessica Bulman-Pozen, Symposium, *Federalism All the Way Up: State Standing and "The New Process Federalism"*, 105 CALIF. L. REV. 1739, 1750 (2017) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576 (1992)) (asserting that "vindicating the public interest is a function usefully assigned not only to 'the Congress and the Chief Executive,' but to the states as well").

¹²¹ Nash, *supra* note 31, at 206.

¹²² *Id.* at 241–44.

¹²³ *Id.* at 243.

¹²⁴ See Varsanyi et al., *supra* note 87 (noting the difficult and delicate nature of trust between local police and immigrant communities).

¹²⁵ Nash, *supra* note 31, at 244.

many would-be plaintiffs.¹²⁶ Thus, this particular context calls for the ability of the state to sue on behalf of its citizens, which will be discussed further below, and this is true despite the fact that this is not a case of under-enforcement within Nash's proposed theory.¹²⁷

2. The Potential Preemption Issue

It is worth noting that “[p]reemption alone is not sufficient to grant standing to a state against the federal government.”¹²⁸ But since state police powers and quasi-sovereign interests are the focus at the heart of sanctuary policies, *parens patriae* standing is the logical means to justify these lawsuits. If states and cities were bringing these claims solely to vindicate issues about being preempted by federal law, they would certainly be invalid.¹²⁹ Here, there is a “true quasi-sovereign interest” as called for by scholar Jonathan Remy Nash.¹³⁰ Nash argued that these “true quasi-sovereign interests differ from competing *parens patriae* interests in that a state asserting the former argues that the federal government has wrongly divested it of specific police power authority, leaving it unable to act within its borders to protect its citizenry.”¹³¹ Nash identified “competing *parens patriae* interests” as claims where states try to argue that their *parens patriae* claim should eclipse any competing claim by the federal government, and Nash established that the Court has “routinely rejected standing based on” this premise.¹³² With sanctuary city challenges, states are not asserting that their *parens patriae* status supercedes the federal government's; instead, they are arguing that the executive branch is violating the separation of powers by appropriating Congress's legislative power,¹³³ or alternatively because the executive is infringing on state police powers.¹³⁴

It must also be noted that it is widely accepted that the “regulation of immigration is a core police power that the states have largely ceded to the federal government.”¹³⁵ However, one can distinguish between the ability of the federal government to legislate and create immigration policy as separate from the implementation role which states

¹²⁶ See Varsanyi et al., *supra* note 87 (“Nevertheless, for those who lack legal status or have status issues, the situation remains perilous, as residents complain of racial profiling and pretextual arrests.”).

¹²⁷ Nash, *supra* note 31, at 243–44.

¹²⁸ Nagdeman, *supra* note 46, at 67.

¹²⁹ *See id.*

¹³⁰ Nash, *supra* note 31, at 218.

¹³¹ *Id.*

¹³² *Id.* at 217–18.

¹³³ Bulman-Pozen, *supra* note 120, at 1741 (first citing *San Francisco v. Trump*, No. 3:17-cv-00485 (N.D. Cal. Mar. 8, 2017), then citing *Santa Clara v. Trump*, No. 3:17-cv-00574 (N.D. Cal. Feb. 23, 2017)).

¹³⁴ *See supra* notes 115–16 and accompanying text.

¹³⁵ Nash, *supra* note 31, at 247.

and local police are tasked with, which is in fact essential to the federal government enforcing its policies at all.¹³⁶ Although “immigration, as a form of control over one’s sovereign borders . . . [was] an aspect of sovereignty that states surrendered to the federal government upon ratification of the Constitution,”¹³⁷ states still have a distinct and important role in implementation that should justify defending the policies that their police want to utilize.¹³⁸ Who is best positioned to know their local communities and how best to enforce immigration laws without creating chaos? Federal law enforcement certainly lacks the connection required to handle this implementation,¹³⁹ but states should not be forced to blindly apply tactics that will disrupt their communities.

Additionally, *Missouri v. Holland*¹⁴⁰ can be read to support the idea that states have not ceded all control over the land within their borders, and to support the argument that enforcement of immigration policies should be up to state and local police.¹⁴¹ Missouri challenged the Migratory Bird Treaty, which the United States had signed with England, and Missouri challenged the congressional act passed to enforce compliance with the treaty.¹⁴² The Court seemingly rested its determination to grant Missouri standing in this case on the conclusion that “the State’s quasi-sovereign rights in the natural resource of migratory birds within its borders” was a valid interest, meeting the injury, causation, and redressability requirements of Article III standing.¹⁴³ It is also “fairly clear that the State complained of losing the power to regulate territory within its borders as to which it had never ceded sovereignty.”¹⁴⁴ The same reasoning could be applied to this context for sanctuary cities. States may not be able to preempt federal immigration policy,¹⁴⁵ namely congressional decisions about what the federal policy will be,¹⁴⁶ but they have not ceded the ability to police the land within their borders how they see fit. If states fail to follow federal law at all, of course issues would arise since federal immigration law preempts state law, but states should have the full power to choose how to reasonably implement those policies on their turf.

This is especially true because this area of the law is “essential to the territorial and jurisdictional integrity of the state, and, by virtue of the constitutional structure

¹³⁶ See, e.g., Varsanyi et al., *supra* note 87 (explaining the federal government’s increasing reliance on local and state police to enforce immigration policy).

¹³⁷ Nagdeman, *supra* note 46, at 78.

¹³⁸ *Id.* at 78–79.

¹³⁹ See Varsanyi et al., *supra* note 87 (“The devolution of immigration enforcement from federal to local authorities threatens to disrupt fragile trust, nurtured over the years, between local law enforcement and immigrant communities.”).

¹⁴⁰ 252 U.S. 416 (1920).

¹⁴¹ See Varsanyi et al., *supra* note 87.

¹⁴² *Holland*, 252 U.S. at 431–32.

¹⁴³ Nash, *supra* note 31, at 219–20.

¹⁴⁴ *Id.* at 220–21.

¹⁴⁵ See *supra* Section II.A.2.

¹⁴⁶ See *supra* Section II.A.2.

of dual sovereignties, the state has no other forum in which to pursue an adequate remedy.”¹⁴⁷ Although the “expansion of federal authorities operating in fields traditionally under the states’ sovereign police powers creates regulatory conflicts with no easy constitutional answers . . . the burden and responsibility of making these determinations is shifting . . . into the federal court system.”¹⁴⁸ This shift should justify the Court accepting cases involving sanctuary policies in the future, as a particularly novel area where state adjudication is necessary to vindicate and protect their citizenry.

Finally, scholar Shannon Roesler honed in on one aspect of the *Snapp* case discussed above which is particularly relevant to why *parens patriae* is the appropriate doctrine for lawsuits regarding sanctuary policies. Roesler stated that the “Supreme Court decided *Puerto Rico* in 1982 after roughly two decades of unprecedented congressional expansion of federal administrative authority over health, safety and environmental issues—the very issues traditionally within the state’s police power.”¹⁴⁹ Roesler further traced the transition of the regulatory landscape by noting: “States now governed alongside and in cooperation with federal administrative agencies. They could not competently exercise their police powers—their authority as *parens patriae*—without participating in the modern administrative state. This regulatory reality permeates the *Puerto Rico* decision.”¹⁵⁰ Roesler is tracing the rise of the role of states within an expanding federal regime over time. Roesler then advocates for her governance approach as a simpler means to justify standing.¹⁵¹ But there are benefits to keeping *parens patriae* as an addition to the common standing elements of injury, causation, and redressability. This is especially true because those three requirements seem to be more leniently applied to states in the post-*Massachusetts v. EPA* world,¹⁵² in a way that may have been controversial for the Supreme Court historically but is now arguably an adopted practice.¹⁵³

¹⁴⁷ Nagdeman, *supra* note 46, at 79.

¹⁴⁸ *Id.* at 80.

¹⁴⁹ Roesler, *supra* note 21, at 672.

¹⁵⁰ *Id.* at 672–73.

¹⁵¹ *See id.* at 678.

¹⁵² *See Davis, supra* note 26, at 587 (“Standing doctrine has a state action problem. There are different standing rules for state actors than for private litigants. Standing doctrine requires private litigants to show a concrete, imminent, and personal injury-in-fact traceable to the defendant and redressable by a judicial remedy. Yet the doctrine does not require the same showing from government litigants. A government litigant may litigate ‘generalized grievances’ and need not show a personal injury-in-fact to have standing.”).

¹⁵³ *See Massachusetts v. EPA*, 549 U.S. 497, 547–48 (2007) (Roberts, C.J., dissenting) (“Today’s decision recalls the previous high-water mark of diluted standing requirements, *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U.S. 669 (1973) In *SCRAP*, the Court based an environmental group’s standing to challenge a railroad freight rate surcharge on the group’s allegation that increases in railroad rates would cause an increase in the use of nonrecyclable goods, resulting in the increased need for natural resources to produce such goods. . . . Over time, *SCRAP* became emblematic not of the

Roesler's governance approach must be contrasted with Tara Leigh Grove's argument that states should not be given special standing when their only interest is in forcing the executive to implement federal law.¹⁵⁴ Grove separates the interest that states have in protecting state law from the separate interest states may have in the manner in which federal agencies implement federal law.¹⁵⁵ Unlike Roesler's approach, which would allow states to sue whenever their administrative role is implicated,¹⁵⁶ Grove's approach goes even further and would limit states' ability to sue in their administrative role only if they are suing to "protect state law from interference by federal agencies."¹⁵⁷ Even under Grove's more limited approach, states suing to protect their existing sanctuary policies meets this tougher standard—because the states are suing to protect state law from federal interference. This falls under Grove's exception that "[w]hen the federal executive 'nullifies a' state experiment . . . a State should have the authority to bring suit to protect the continued enforceability of its law."¹⁵⁸ One can also argue that sanctuary policies are important "experiments" by the states which should not be swept in or out by the federal executive's administration but instead should be up to the relevant state to delineate.

B. Importance of Parens Patriae as a Requirement for State Standing

In *Massachusetts v. EPA*, Chief Justice Roberts asserted in his dissent that *parens patriae* merely creates an additional hurdle for states to pass in order to show they have met standing requirements.¹⁵⁹ But this "hurdle" may actually balance out any of the concerns that states are receiving unwarranted special treatment in meeting standing requirements.¹⁶⁰ Requiring states to show that they have a substantial interest in their citizenry would provide an additional safeguard to prevent states

looseness of Article III standing requirements, but of how utterly manipulable they are if not taken seriously as a matter of judicial self-restraint.").

¹⁵⁴ Grove, *supra* note 36, at 890.

¹⁵⁵ *See id.* at 868.

¹⁵⁶ *See* Roesler, *supra* note 21, at 678.

¹⁵⁷ Grove, *supra* note 36, at 891.

¹⁵⁸ *Id.*

¹⁵⁹ *See supra* Section I.B.3; *cf.* Sara Zdeb, *From Georgia v. Tennessee Copper to Massachusetts v. EPA: Parens Patriae Standing for Global-Warming Plaintiffs*, 96 GA. L.J. 1059, 1075 (arguing that *parens patriae* should be a separate route from the traditional three-prong test for private litigants for states to meet standing requirements: "the premise that *parens patriae* suits are civil analogues to state criminal prosecutions—in both cases, states seek to vindicate public rights—supports the argument that they inherently meet Article III's case-or-controversy requirement and are not subject to the three-prong standing test").

¹⁶⁰ *See* Ann Woolhandler, Symposium: *Standing in the Robert's Court: Governmental Sovereignty Actions*, 23 WM. & MARY BILL OF RTS. J. 209, 225, 228–30 (2014) (criticizing *parens patriae* standing because individuals can bring suits on their own, and arguing that individuals have more of an interest in invalidating laws than states do).

from abusing this doctrine. It would also prevent states from taking advantage of the more lenient standards that *Massachusetts v. EPA* solidified.

But *parens patriae* may not need to be viewed as an additional hurdle at all. Scholar Matthew Cody has argued that when it comes to state standing, states should be able to use quasi-sovereign, or *parens patriae*, standing when they have been given congressional authorization to sue.¹⁶¹ Specifically, Cody mentioned immigration as a context where state police powers are easily triggered, making this a prominent area where congressionally authorized state standing could be useful.¹⁶² If standing was congressionally authorized, then this would not be a “hurdle” for states to meet at all, however there may be implications arising from requiring congressional authorization, which will be discussed later along with other proposed safeguards to limit the doctrine of *parens patriae*.¹⁶³

Aside from Cody’s arguments, scholar Bradford Mank argued that, “Because the *parens patriae* doctrine gives states the right to protect a broad range of interests that affect the health, safety, welfare, and economics of their citizens, it is reasonable to give states broader latitude in obtaining standing for generalized injuries that affect many of their citizens.”¹⁶⁴ This is in opposition to the stance Chief Justice Roberts took in his dissent in *Massachusetts v. EPA* because Mank is asserting that the generalized grievance standard simply makes the process of meeting standing requirements easier for states,¹⁶⁵ thus no hurdle at all exists. Regardless of whether *parens patriae* is viewed as an additional hurdle, or a mechanism that eases the requirements for states to satisfy standing, *parens patriae* should be required for other reasons beyond mere justiciability issues.

1. Benefits of a Role for State Attorneys General

There are also distinct benefits to having states sue rather than individuals. Bradford Mank noted some of the benefits of state attorneys general suing in place of individuals, including that a “state in a *parens patriae* suit may be able to secure broader relief and represent a broader range of interests than a suit by individuals, even if those individuals file a class action.”¹⁶⁶ Mank also noted that it is “generally less costly for the state [attorney general (AG)] to file one lawsuit than for dozens of private individuals to file suit.”¹⁶⁷ State attorneys general can also choose a more tactical, strategic approach in their litigation by allying with “colleagues in other

¹⁶¹ Cody, *supra* note 60, at 168–69.

¹⁶² *Id.* at 168–69.

¹⁶³ *See infra* Section II.B.2.

¹⁶⁴ Mank, *supra* note 48, at 1767 (noting that “[c]ourts have recognized *parens patriae* standing for mass torts and consumer fraud”).

¹⁶⁵ *See id.*

¹⁶⁶ *Id.* at 1781.

¹⁶⁷ *Id.*

states to reduce costs or to increase the level of legal or technical expertise for the plaintiffs, as in the *Massachusetts* litigation, where twelve state AGs joined as petitioners.¹⁶⁸ Allowing states to sue in the place of individuals also reduces the pool of litigants, which can help the efficiency of the courts.¹⁶⁹ Political obligations will likely limit the number of lawsuits any state attorney general will take the time and effort to bring.¹⁷⁰ State attorneys general will still need to appeal to a wide enough constituency to maintain support, and perhaps it could be beneficial to have important national issues play a role at the state level if state attorneys general become motivated to take on issues of policy that can cross state boundaries or lead to multistate litigation.¹⁷¹

There has been some scholarship suggesting that state attorneys general would be overly ambitious in what cases they chose to engage in against the federal government,¹⁷² but the limitations they face in terms of resources like time and money reduce this concern.¹⁷³ State attorneys general “are usually confronted with significant demands on their limited resources, which can quickly become overtaxed when confronted with the demands of complex multistate litigation such as the *Massachusetts* case.”¹⁷⁴

However, there are also arguments that state attorneys general have too politically charged a role, making them inadequate litigants on behalf of their citizens.¹⁷⁵ Grove noted that, “state attorneys general are elected by the voters of the State and often politically ambitious. (Indeed, one political scientist has suggested that ‘AG’ is often short for ‘aspiring governor.’) Accordingly, state attorneys general have strong political incentives to respond to the preferences of state constituents.”¹⁷⁶ Although the potential danger of needing to appeal to a majority of the electorate could arise, the monetary and time limitations mentioned above should limit this concern too. Lastly, there is also a concern that with a reduced standing requirement,

¹⁶⁸ *Id.* at 1782.

¹⁶⁹ Cody, *supra* note 60, at 171.

¹⁷⁰ *Id.*

¹⁷¹ Mank, *supra* note 48, at 1784.

¹⁷² See, e.g., Nagdeman, *supra* note 46, at 85 (arguing that state actors present accountability problems and have a “perverse accountability incentive . . . to pursue ideological agendas that play well to a localized base but could have outsized national impacts”).

¹⁷³ See Lawrence G. Wasden & Brian Kane, *Massachusetts v. EPA: A Strategic and Jurisdictional Recipe for State Attorneys General in the Context of Emission Accelerated Global Warming Solutions*, 44 IDAHO L. REV. 703, 723 (2008) (“But this does not mean that attorneys general will view [*Massachusetts v. EPA*] as a mandate to engage the federal government in litigation.”).

¹⁷⁴ *Id.*

¹⁷⁵ See Grove, *supra* note 36, at 896 (“These state officials have a legal obligation to protect the interests of their respective States (by, for example, litigating on behalf of state agencies, or defending state law); they have no special responsibility to focus on the national public interest.”).

¹⁷⁶ *Id.* at 896–97 (also noting that “[p]erhaps unsurprisingly, the existing research suggests that state attorneys general often bring lawsuits that are likely to curry favor with state voters”).

post—*Massachusetts v. EPA*,¹⁷⁷ the costs will be lower for state attorneys general to bring these types of lawsuits.¹⁷⁸ This may increase the number of national policy issues playing a role in state campaigns if state attorneys general start to focus on broader issues that may have more appeal to their constituents.¹⁷⁹ But state attorneys general are supposed to have a “substantial portion” of the population affected in order to bring a *parens patriae* claim,¹⁸⁰ so perhaps the real concern should be that minority interests face yet another obstacle in being heard.

Despite the reasonable arguments on both sides for the motives of state attorneys general, there are other protections in place that have been largely forgotten in this debate, but which will prevent state attorneys general from reaching too far and upsetting the balance of federalism in their use of *parens patriae* standing.

2. Safeguards to Limit the Use of *Parens Patriae*

Other doctrines create safeguards that the courts can use to limit state attorneys general in bringing *parens patriae* suits. One example are Rule 11 sanctions under the Federal Rules of Civil Procedure to stop any frivolous claims from coming forward.¹⁸¹ Under Rule 11(c), courts may impose sanctions on attorneys or parties that file frivolous claims.¹⁸² This should deter state attorneys general from bringing lawsuits without merit, and when this is coupled with the political considerations that were discussed above, it should incentivize meaningful lawsuits with particular relevance to the state’s citizenry.

Another example of a safeguard against a flood of *parens patriae* litigation is the political question doctrine. The Supreme Court has used this doctrine to reject cases that would pull the Court into a political battle or into an area it believes is reserved for a different branch of government.¹⁸³ This doctrine leaves whole sectors

¹⁷⁷ See Davis, *supra* note 26, at 587.

¹⁷⁸ Dru Stevenson, *Special Solitude for State Standing: Massachusetts v. EPA*, 112 PENN. ST. L. REV. 1, 9–10 (2007).

¹⁷⁹ *Id.*

¹⁸⁰ See Roesler, *supra* note 21, at 667 (citing *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 236 (1907)).

¹⁸¹ Mank, *supra* note 48, at 1783.

¹⁸² FED. R. CIV. P. 11(c).

¹⁸³ See Matthew S. Melamed, *A Theoretical Justification for Special Solitude: States and the Administrative State*, 8 CARDOZO PUB. L. POL’Y & ETHICS J. 577, 592 (2010) (“While the standing and political question doctrines are independent considerations, examining the three standing requirements through the lens of the political question doctrine sheds light on justifications for those requirements.”). See also Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1863 (2001) (providing a broader discussion of the political question doctrine: “Although influential scholars criticize the political question doctrine, its bar on jurisdiction supports the idea that Article III courts, lacking a democratic portfolio, ought to intervene in public life only ‘in the last resort,’ even

“of public life to Congress and the President, on the grounds that the Constitution assigns responsibility for these areas to the other branches, or that their resolution will involve discretionary, polycentric decisions that lack discrete criteria for adjudication and thus are better handled by the more democratic branches.”¹⁸⁴ The political question doctrine specifically “can be seen as a coordinate doctrine that helps courts weed out a number of, but not all, political questions.”¹⁸⁵ The combination of standing and political question doctrines will certainly have the effect of limiting what cases will be brought before the Supreme Court.

One final example of a potential limitation is for the courts to require congressional authorization for a state to be able to sue to vindicate or challenge its role in the enforcement of federal legislation.¹⁸⁶ This could present problems in today's politically polarized world and states may be robbed of an important role in our dual-federalism framework if they must await congressional approval before challenging the federal government.¹⁸⁷ There is also little credence to the concern that sanctuary policy-based litigation “would expand the power of the judiciary at the expense of both the executive and legislative branches.”¹⁸⁸ Not only do the safeguards discussed here severely limit this possibility, but in light of the multiple ways that states could frame their challenge of the Executive branch—i.e., as a vindication of their police powers¹⁸⁹—the concern is not that the Court will overstep, but rather if the Court refuses to intervene, many communities will suffer, and states will be left without any forum for their claims.¹⁹⁰ It is unlikely that “the ideological gridlock of the national legislature [will] infect the federal courts,”¹⁹¹ as David Nagdeman warned, again because states have limited resources and time to bring these claims. Additionally, our constitutional system was designed for inefficiency and gridlock,¹⁹²

apologetically, when the other, presumably more democratically legitimate, branches default on their obligations.”).

¹⁸⁴ Hershkoff, *supra* note 183, at 1862.

¹⁸⁵ Melamed, *supra* note 183, at 592.

¹⁸⁶ See Leah M. Litman, *Taking Care of Federal Law*, 101 VA. L. REV. 1289, 1334–35 (2015) (arguing that state interests in enforcing federal law do not fall into quasi-sovereign interests and should require Congressional authorization).

¹⁸⁷ This statement is especially true lately. See Jordain Carney, *Senate Dems Block Crackdown on Sanctuary Cities*, THE HILL (Feb. 15, 2018, 3:26 PM), <http://thehill.com/blogs/floor-action/senate/374078-senate-dems-block-crackdown-on-sanctuary-cities> [<https://perma.cc/B9H2-H4NV>] (discussing the recent battle over these policies between the executive and legislative branches, demonstrating gridlock is no less of a barrier at the federal level).

¹⁸⁸ Nagdeman, *supra* note 46, at 86.

¹⁸⁹ See *supra* Section II.A.

¹⁹⁰ See *supra* note 143 and accompanying text.

¹⁹¹ Nagdeman, *supra* note 46, at 88.

¹⁹² See, e.g., Bulman-Pozen, *supra* note 120, at 1740–41 (discussing the foundations of federalism and the necessary “jousting” between states and the federal government over how federal law is carried out).

so this should not be a motivating factor in casting out an opportunity for states to vindicate important claims, especially when they have no other avenue to challenge them.¹⁹³ But the options discussed in this section really attest to the fact that there are other safeguards, or potential safeguards, to prevent states from overusing the doctrine of *parens patriae*.¹⁹⁴ Ideally, this doctrine would not be one which state attorneys general used without the proper gravitas and concern for their citizens, however these other doctrines provide definitive ways which courts could still limit the *parens patriae* cases that were deemed justiciable.

There have also been some more extreme arguments about how far *parens patriae* standing could extend. One such argument was briefly mentioned above and comes from Kenneth Juan Figueroa, who asserts that *parens patriae* could be used to justify foreign governments suing on behalf of immigrants in United States courts.¹⁹⁵ Another argument, working toward justifying suits from the opposite end of the spectrum, comes from Kaitlin Ainsworth Caruso, who asserts that cities should be able to sue on behalf of their citizens in a *parens patriae*-like role.¹⁹⁶ Note that Caruso's article seeks to get around *parens patriae* by utilizing "associational standing" from the realm of corporate law.¹⁹⁷ However, both of these arguments seem to come from more radical possibilities for *parens patriae* that are not rooted in precedent, unlike the discussion here regarding sanctuary policies. The three safeguards discussed above are likely to prevent more traditional *parens patriae* cases so concerns over the more extreme possibilities introduced here should not deter the use of *parens patriae* going forward.

CONCLUSION

Ultimately, *parens patriae* is the most logical basis for states to have standing to sue on behalf of their residents to vindicate sanctuary city policies. States have a unique and historic interest, linked to the justifications for quasi-sovereign interests which were used as a basis for standing scattered throughout the Court's history,¹⁹⁸ that justify this basis for standing. The interest in protecting and implementing state and local police powers in a way that reasonably works from community-to-community

¹⁹³ See *supra* note 143 and accompanying text.

¹⁹⁴ See also Raymond H. Brescia, *On Objects and Sovereigns: The Emerging Frontiers of State Standing*, 96 OR. L. REV. 363, 439–40 (2018) (arguing that "regardless of the administration or political party in power, states can serve as political and constitutional counterweights when they perceive that the federal government is threatening their interests and those of their constituents").

¹⁹⁵ Figueroa, *supra* note 22, at 470.

¹⁹⁶ Caruso, *supra* note 110, at 61. See also Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227 (2018) (arguing that plaintiff city claims add value as a form of state building).

¹⁹⁷ Caruso, *supra* note 110, at 83.

¹⁹⁸ See *supra* Sections I.A.2–3.

is best left to the determination of the states.¹⁹⁹ This is especially true in light of the transition of immigration enforcement power in recent years from the federal government to local and state police.²⁰⁰ Additionally, the sensitive nature of immigration enforcement, particularly the delicate balance a community must strike to avoid inciting chaos and fear while trying to enforce the law, calls for states to be able to challenge the federal government when it overreaches or over-enforces its power and infringes on the police power of the states.²⁰¹

Parens patriae could also be a beneficial requirement for state standing for sanctuary city challenges because it may provide a backstop to calm the nerves of those who question the more lenient standard which states receive when proving they have met the injury, causation, and redressability requirements for standing post-*Massachusetts v. EPA*.²⁰² If *parens patriae* can be used to attain justiciability for cases on sanctuary policies, it will allow the Supreme Court to help clarify this very muddled area of federalism, where the acceptable immigration policies vary so widely by jurisdiction and by state despite the mismatch of the federal government handing down broad Executive Orders with policies meant to restrict every locale equally.²⁰³ *Parens patriae* is not an “ill-fitting, expansive grant of standing,”²⁰⁴ especially as it can be limited by the many safeguards, like the political question doctrine, discussed above.²⁰⁵ The *parens patriae* doctrine should be reaffirmed in the post-*Massachusetts v. EPA* world, where states enjoy special solicitude. Reaffirming this doctrine would allow states to vindicate the important immigration interests of their residents and citizens by making decisions about how best to implement local and state police power. Especially in the context of immigration, these implementation decisions should be left not to the federal government, but to the states and locales directly responsible to their residents who are immediately impacted by these policies. To allow states and localities to defend such decisions, they must be able to get past the hurdle of standing to bring their cases in federal court, and again as *parens patriae*, or parents of their citizens in this particular context, states should be given standing to represent and defend their sanctuary policies.

¹⁹⁹ See *supra* note 124 and accompanying text.

²⁰⁰ See *supra* note 111 and accompanying text.

²⁰¹ See *supra* notes 121–22 and accompanying text (responding to Nash’s arguments about under-enforcement of the Executive branch justifying state lawsuits and arguing immigration provides a context where over-enforcement is just as important a justification for state lawsuits).

²⁰² See *supra* Section II.B.

²⁰³ See *supra* Section I.C.

²⁰⁴ Nagdeman, *supra* note 46, at 92.

²⁰⁵ See *supra* Section II.B.2.